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No. 03-416

Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID W. OSTRANDER,
Trustee in Bankruptcy,

Petitioner,

v.

CITY OF SPRINGFIELD, MASSACHUSETTS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Whether the First Circuit correctly determined that federal E-Rate discount funds approved for Springfield are not property of the estate of a bankrupt contractor with no equitable interest in the E-Rate discounts where the contractor was fully paid for its services by Springfield.

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I. Counter-Statement of the Case

The Petition asserts that the purpose of the E-Rate program "is to encourage public schools to connect to the internet." (Pet. 2). That is the practical effect of the program, not its purpose. The purpose of the E-Rate program is to provide *affordable* telecommunications services for schools, especially those in economically disadvantaged areas. Pet., App. at 69a. This is one of the means Congress authorized to help the Federal Communications Commission ("FCC") fulfill its mandate to regulate commerce in communication so it is available, without discrimination, to the people of the United States. 47 U.S.C. § 151.

The Telecommunications Act of 1996 ("Telecom Act") requires providers of telecommunications services to contribute to the Universal Service Fund ("USF") in an equitable and nondiscriminatory manner so that there are specific, predictable, and sufficient federal mechanisms to preserve and advance universal service.[1] Pet., App. at 67a. (specifying telecommunications carrier contribution). Telecommunications carriers do not own the radio frequency spectrum.[2] It "belongs to the people:[3] 'Those who

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[1] "Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services." Pet., App. at 65a-66a.

[2] The radio spectrum as used herein means any transmission, emission, or reception of signs, signals, writing, images, sounds or intelligence of any nature by means of electromagnetic waves of frequencies lower than three thousand gigacycles per second (3000 GHz) propagated in space without artificial guide.

[3] "The electromagnetic spectrum is an unusual common good, or natural resource because, unlike iron, oil, or coal, it is not destroyed by use. When one user stops using a portion of the spectrum, another can

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characterize public-interest obligations as encroachments on licensees' rights ignore the fact that licensees use precious public property for their own private gain.'" William L. Fishman, *Property Rights, Reliance, and Retroactivity under the Communications Act of 1934*, 50 Fed. Comm. L.J. 1, 5 (1997) (footnote omitted). Among other things, universal service is designed to: promote quality services at just, reasonable, and affordable rates; increase access to advanced telecommunications services; and advance the availability of such services to all consumers, including those in low income areas. Pet., App. at 64a-65a (stating universal service principles).

Petitioner says that "USAC subsidizes contracts" (Pet. 2). USAC does not subsidize contracts. The Telecom Act limits USF use to "the provision, maintenance, and upgrading of facilities and services for which the support is intended." Pet., App. at 67 (authorizing universal service support).[4] Such use must "be explicit and sufficient to

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readily use it. The spectrum is scarce, though, because at any given time and place one use of a portion of the spectrum precludes any other use of that portion. The use of the radio spectrum is regulated, access is controlled and rules for its use enforced because of the possibilities of interference between uncoordinated uses." Paul C. Roosa, *Regulating the Use of Spectrum* in FEDERAL SPECTRUM MANAGEMENT: A GUIDE TO THE NTIA PROCESS (NTIA Special Publication 91-25, 1992) <http://www.ntia.doc.gov/osmhome/roosa3.html> (visited September 25, 2003).

[4] "This support, denominated the E-Rate discount, is offered either by requiring that service providers who are mandatory contributors to the Fund confer discounts to applicants or by providing applicants with reimbursement from the Fund when other qualified service providers are used. The level of E-Rate discounts or reimbursements is largely dependent on the economic condition of the target area. In areas of lower income, the discount or reimbursement is higher; in areas of

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achieve the purposes" of universal service. Pet., App. at 67a. The E-Rate discounts for schools are intended "to ensure affordable" telecommunications access for schools. Pet., App. at 69a.

Petitioner mistakenly alleges[5] "that the choice of the BEAR method of payment" established "a creditor-debtor relationship between Springfield and [its] service provider, Lan Tamers." Springfield's right to the unpaid E-Rate discount is equitable in nature.[6] Lan Tamers has no beneficial interest in the unpaid E-Rate discounts awarded Springfield. "USAC's reimbursement procedures unequivocally state that where the BEAR payment method applies, the service provider acquires no rights of ownership in the proceeds of the reimbursement." Pet. App. at 27a.

Petitioner's assertion that the E-Rate discounts were a contested "USAC account receivable" (Pet. 3) was rejected by the Bankruptcy Court which ruled "that the City's rights to the funds fall outside the scope of the Code's definition of 'claim'." Pet., App. at 36a. Petitioner misconstrues "the nature of the transactions as well as the

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higher income, the discount or reimbursement is lower." Pet., App. at 25a (citations and footnote omitted).

[5] Pet. 3.

[6] Lan Tamers, "the Debtor has no claim against USAC, both because USAC was not a party to the Debtor's contract with the City and because the Debtor was, in any event, paid in full for the Central High School and Network Maintenance Projects. The Debtor is owed nothing by USAC. It is the City that is owed money from the Universal Service Fund. Accordingly, the Creditors' characterization of the USAC Reimbursements as accounts receivable due to the Debtor is erroneous." Pet. App. at 38a (footnote omitted).

parties to the transactions." Pet., App. at 36a; *see also* Pet., App. at 36a-37a (explaining the "two separate and distinct transactions" which "both stem from a single federal statutory scheme.").

Contrary to Petitioner's contention (Pet. 4) the Bankruptcy Court[7] did not attempt to create a federal common law constructive trust. The Bankruptcy Court, as an alternative holding,[8] ruled that Lan Tamers "lacks equitable title in the Reimbursements because it holds the funds under constructive trust for the benefit of the City." Pet., App. at 41a.

Petitioner unfairly criticizes the First Circuit for characterizing "the tripartite transaction as a 'pass through'" and Petitioner incorrectly asserts the pass through issue "had not been previously raised." Pet. 5. The Adversary Proceeding complaint stated that Lan Tamers has "no interest" in the E-Rate discounts and is "fully aware of the requirement" that the "BEAR is a vehicle to pass" the discounts "through to the City." The parties stipulated that Lan Tamers "signed the BEAR application

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[7] Petitioner misstates the proceedings below by implying that the subject of federal common law was not considered by the United States District Court. Pet. 4. Such an implication is unjustified. That topic was briefed in the District Court where it was reviewed by United States District Judge Ponsor who aptly concluded that the petitioner's appeal "is without merit." Moreover, when the case was pending before the District Court, a prompt decision was required to avoid the potential loss "of substantial federal reimbursement and federal funding." Pet., App. at 57a.

[8] The Bankruptcy Court held that Lan Tamers did "not have equitable title in the Reimbursements because it holds the funds in a resulting trust for the City." Pet., App. at 40a.

form" which obligates Lan Tamers to "remit the discount amount" to Springfield "as soon as possible" and in no event "later than 10 calendar days after receipt of the reimbursement payment." Thus, the 'pass through' issue was raised, considered and decided in the lower courts. Pet., App. at 9a-10a ("The plain text of § 541(d) excludes property from the estate where the bankrupt entity is only a delivery vehicle and lacks any equitable interest in the property it delivers."); Pet., App. at 35a-36a ("if the Debtor holds only bare legal title as a conduit channeling federal grants to the City, the funds are out of the reach of the Debtor's creditors pursuant to § 541(d).").

II. Reasons for Denying the Petition

A. Petitioner raises new issues

The questions presented in the Petition were not raised in the lower courts. The Court should reject such "last minute afterthought assertions." 14 AM. JUR. 2d *Certiorari* § 101 (2003); *cf. Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.").

Petitioner's questions presuppose judicial creation of a property interest to which Petitioner objects. The First Circuit did not create a property interest. Under the E-Rate program,[9] the beneficial interest in the unpaid

[9] The E-Rate program is administered by USAC which is a not-for-profit corporation appointed by the FCC to ensure that the benefits of telecommunications services reach students across the country. "The

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discounts belongs to Springfield. Lan Tamers has no beneficial interest in the E-Rate discounts, only the duty to immediately turn those funds over to Springfield.

The First Circuit's opinion is less complex and far-reaching than Petitioner makes it out to be. The case below involved one basic question: whether the unpaid federal E-Rate discounts were property of a bankrupt contractor's estate when the contractor was fully paid for the work and the funds were approved for Springfield. The First Circuit answered this question in the negative, based upon the undisputed facts contained in the record below. Pet., App. at 2a-3a.

When "Lan Tamers filed for bankruptcy, Springfield had already paid it in full for installation and maintenance of internet networks at various schools. USAC had already approved E-Rate funding for the projects." Pet., App. at 2a-3a. The Bankruptcy Court and the District Court held that these "funds belong to Springfield and are not property of the estate." Pet., App. at 3a. Those decisions were affirmed by the First Circuit in a holding which is proper in all respects and does not call for a review by this Court.

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procedures for applying for reimbursement are set forth in the FCC's regulations and the USAC manual. *See* 47 C.F.R. § 54.504 (2002); USAC application procedure guide, *available at* http://www.sl.universalservice.org/apply/." Pet., App. at 26a.

B. The First Circuit's Decision does not conflict with relevant decisions of the Court

In a transparent attempt to grab this Court's attention, Petitioner contends that the First Circuit's ruling is directly at odds with relevant decisions of this Court, principally *Butner v. United States*. Pet. 5-11. This contention is meritless.

In *Butner*, the Court was concerned with "the proper interpretation of the federal statutes governing the administration of bankrupt estates." *Butner v. U.S.*, 440 U.S. 48, 51 (1979). As part of that function, the Court observed that "[u]niform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'" *Id.*, at 55 (citation omitted). In this case Petitioner seeks the type of windfall by the happenstance of bankruptcy which the *Butner* Court indicated should be prevented.[10]

This case is not like *Butner* where resort to state law was needed to determine property rights in the assets of a bankrupt's estate. Under the Bankruptcy Code, the E-Rate discounts are not property of the estate. Lan Tamers has no entitlement to double payment for public work. Lan Tamers' creditors stand in Lan Tamers' shoes. Nothing in the Bankruptcy Code gives Petitioner any right to the

[10] The First Circuit cogently observed that distributing the E-Rate discounts to Petitioner "would provide a windfall to the creditors at the expense of Springfield's public schools and its students, contrary to the dictates of the statutory and regulatory text underlying the E-Rate program." Pet., App. at 15a.

E-Rate discounts. The federal interests under the Telecom Act require a different result.

The E-Rate program was designed to provide affordable telecommunications services to financially stressed schools. Requiring schools to pay twice for telecommunications services would frustrate the Congressional purpose of making such services *affordable* for *economically distressed school districts*.[11] The First Circuit correctly observed that "[w]here there are significant federal interests involved,[12] the default rule of applying state standards to bankruptcy determinations may yield."[13] Pet., App. at 17a (footnote omitted).

The First Circuit's decision does not conflict with *Barnhill v. Johnson*, 503 U.S. 393 (1992). In *Barnhill*, a Chapter 11 trustee brought an adversary proceeding under the Bankruptcy Code's preference avoidance section, 11

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[11] "The amount of funding a school receives from the USF depends on the area's poverty level, and ranges from 20% to 90% of the total cost of eligible projects. Springfield, one of the state's most economically disadvantaged school districts, generally receives near the maximum percentage." Pet., App. at 4a (citation omitted).

[12] The significant federal interests at issue in this case were identified by the First Circuit (Pet., App. at 3a-4a) and are specified in the Telecom Act. Pet., App. at 64a-76a.

[13] Petitioner's erroneous assertions regarding Massachusetts state law (Pet. 6-7) add no weight to its argument concerning decisions of the Court. "Here, the statutory and regulatory framework for the E-Rate program, established under the Telecom Act, provides a federal definition of the property interests involved in this case. That definition takes account of the federal government's aspiration, expressed in the Telecom Act and promoted by the activities of the FCC and USAC, that '[e]lementary and secondary schools and classrooms . . . should have access to advanced telecommunications services.'" Pet., App. at 17a (citation omitted).

U.S.C. § 547, to recover an allegedly preferential transfer made by check. The Court held that for purposes of determining if a transfer occurred within the 90-day preference period, a transfer made by check occurs on the date the check is honored, rather than the date of the payee's receipt of check. 503 U.S. at 395.[14] The Bankruptcy Code's preference avoidance section at issue in *Barnhill* is not involved in this case. Application of the *Barnhill* principle (*i.e.*, a transfer made by check occurs on the date a check is honored not the date the payee receives the check) reveals that Lan Tamers has no property interest in the unpaid E-Rate discounts. USAC has not yet delivered,[15] much less honored, the checks for the E-Rate discounts. Because Lan Tamers has not received the checks, under *Barnhill* as a matter of federal law, Petitioner has no property interest in the unpaid E-Rate discounts.

There is no conflict between the First Circuit's decision and *BFP v. Resolution Trust Corp.*, 511 U.S. 531 (1994). In *BFP*, a Chapter 11 debtor in possession brought a fraudulent transfer proceeding to avoid a mortgage

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[14] In adopting the date of honor rule, the Court observed that "'[w]hat constitutes a transfer and when it is complete' is a matter of federal law. This is unsurprising since, as noted above, the statute itself provides a definition of 'transfer.' But that definition in turn includes references to parting with 'property' and 'interest in property.' In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law. Thus it is helpful to sketch briefly the rights and duties enjoyed under state law by each party to a check transaction." 503 U.S. at 397-98 (citations omitted).

[15] "There is no claim that Springfield did not meet all the requirements to get the funding; USAC, in whose coffers the funds now reside, argues that the money should go to Springfield." Pet., App. at 9a; *see also* Pet., App. at 21a, n.5.

foreclosure sale under the section of the Bankruptcy Code[16] conferring power to avoid fraudulent transfers. BFP's position was that the price received at a mortgage foreclosure sale was less than the property's reasonably equivalent value. In rejecting that position, the Court observed that "[i]t is beyond question that an essential state interest is at issue" – title to real estate. 511 U.S. at 544. Unlike the situation in *BFP,* here, there is no essential state interest at stake;[17] the essential governmental interest at stake is a federal one – providing affordable internet access to schools as authorized in the Telecom Act. Pet., App. at 69a. Equally inapposite is Petitioner's cite (Pet. 9) to *English v. General Elec. Co.*, 496 U.S. 72 (1990) in which the Court concluded that "petitioner's claim . . . does not fall within the pre-empted field of nuclear safety." 496 U.S. at 90. No state law conflicts with the E-Rate program and so the *English* preemption analysis is inapplicable.

The First Circuit's decision does not conflict with *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003). In *NextWave*, the Court held that section 525 of the Bankruptcy Code, 11 U.S.C. § 525, prohibits the FCC from revoking licenses held by a bankruptcy debtor for failure to make timely payments to the FCC for purchase of the licenses. E-Rate discounts differ from FCC licenses. "FCC

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[16] 11 U.S.C. § 548.

[17] It is reasonable to require a "clear and manifest" federal statutory purpose in order to displace, pre-existing state law when a state's sovereign interest in the security and stability of land titles is at stake. In this case, however, federal statutory purposes should not be displaced, particularly in light of the fact that there are no important state interests at stake.

licenses have many qualities of property in which the licensee holds beneficial interest, sweeping them out of the § 541(d) exclusion and into the broad overall definition of property of the estate." Pet., App. at 18a-19a. The E-Rate discounts are within the plain text of § 541(d) which "excludes property from the estate where the bankrupt entity is only a delivery vehicle and lacks any equitable interest in the property it delivers." Pet., App. at 9a-10a. *NextWave* dealt with specific language in the Bankruptcy Code which barred the government from revoking a license for a debtor's nonpayment. "Here, in contrast, the trustee points to no similar provision of the Code that applies to the reimbursements and stands in opposition to the federal rules derived from the E-Rate program's regulatory scheme." Pet., App. at 19a.

Petitioner posits that "property is possessed of both legal and equitable title." Pet. 10. In this case, Petitioner possesses neither legal nor equitable title to the E-Rate discounts. USAC has not delivered the E-Rate discount checks and retains possession of the E-Rate funds. Springfield fully paid Lan Tamers for the work. Springfield obtained equitable title to the E-Rate discounts by applying, qualifying and obtaining USAC approval for them. Lan Tamers has the duty to immediately turn the E-Rate discounts over to Springfield. "Under the BEAR payment method, LAN Tamers has absolutely no freedom to do anything with the reimbursements except forward them to Springfield within ten days. LAN Tamers was explicitly barred from 'tendering or making use of' the payment from USAC before Springfield was reimbursed." Pet., App. at 13a.

C. The First Circuit did not make new law.

Petitioner's assertion that the First Circuit created "judge-made law" is erroneous. Pet. 11. The First Circuit fairly resolved this case by correctly applying the law to the relevant facts. That legitimate exercise of the judicial function does not implicate the constitutional principle of separation of powers.

1. Springfield is not a creditor of Lan Tamers.

Petitioner incorrectly asserts that Springfield is a creditor[18] of Lan Tamers. Pet. 11-12. "A 'creditor' in bankruptcy is anyone who has a 'claim' against the bankrupt estate that arose (so far as bears on this case) no later than the filing of the voluntary petition in bankruptcy." *Fogel v. Zell*, 221 F.3d 955, 960 (7th Cir. 2000) (citations omitted).

Springfield is not a bankruptcy "creditor" of Lan Tamers for purposes of the unpaid E-Rate discounts. Springfield fully paid Lan Tamers. After Springfield paid Lan Tamers, Springfield applied to USAC for the E-Rate discounts. Although USAC approved Springfield's application, USAC has not yet delivered the E-Rate discount checks to Lan Tamers[19] which has no beneficial or equitable interest

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[18] Under the Bankruptcy Code, a "creditor" means an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10)(A).

[19] "Upon receipt of the funds, the service provider must promptly remit that sum to the applicant. Regardless of the method of payment chosen, reimbursement checks are made payable to the order of the service provider." Pet., App. at 27a (citations omitted).

in the unpaid E-Rate discounts. Lan Tamers' duty to deliver the E-Rate discount funds to Springfield arises upon Lan Tamers actual receipt of the checks. Since Lan Tamers voluntarily filed for bankruptcy before receiving delivery of the E-Rate discount checks, Springfield's right to receive the E-Rate discounts from Lan Tamers can only arise post-petition; consequently, Springfield is not a 'creditor' of Lan Tamers under the Bankruptcy Code.

Springfield's equitable right to the unpaid E-Rate discounts is not a "claim"[20] under the Bankruptcy Code. A bankruptcy claim implies a legal right. Before a tort occurs a potential victim has no legal right against the potential tortfeasor. *Fogel v. Zell*, 221 F.3d 955, 960 (7th Cir. 2000). If Lan Tamers receives the E-Rate discounts and converts them to its own use, Lan Tamers will commit a tort. The tort has not yet occurred because USAC has not delivered the E-Rate discount checks to Lan Tamers. Because Lan Tamers never received (much less converted) the E-Rate discounts, Springfield has no bankruptcy "claim" against Lan Tamers for the unpaid discounts. As explained by the Bankruptcy Court:

> Under the particular payment mechanism agreed to under the Central High School and Network Maintenance contracts, the obligations of both parties to these contracts were fully satisfied. The Debtor performed the services required under the contracts and Springfield paid the full

[20] Under the Bankruptcy Code, a "claim" is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A).

> value of the services performed. There is no further obligation of the Debtor to Springfield which could be characterized as a right to payment or an equitable remedy for breach of a performance giving rise to such a right. Accordingly, Springfield has no "claim" against the Debtor as defined by § 101(5). To the extent that Springfield had an "expectation of payment" and thus a "claim" at all, it would be a claim against USAC arising out of Springfield's separate relationship with USAC as a grantee of federal funds under the Universal Service program.

Pet., App. at 37a-38a.[21]

2. USAC Discounts are not property of estate.

In the Bankruptcy Code, Congress broadly defined property of the estate. Pet., App. at 60a-61a; *see also* Pet., App. at 8a; 34a. In making that definition, Congress excluded certain property from the bankruptcy estate.[22] Pet., App. at 61a-63a; *see also* Pet., App. at 8a-9a; 34a. Excluded property is not an asset of the bankruptcy estate. The Bankruptcy Court based its decision on 11 U.S.C. § 541(d) which excludes "[p]roperty in which the

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[21] Similarly Lan Tamers' duty to deliver the E-Rate discount checks to Springfield is not a bankruptcy "debt." A "debt" under the Bankruptcy Code is "liability on a claim." 11 U.S.C. § 101(12). Lan Tamers' liability for turning over the E-Rate funds does not arise until Lan Tamers actually receives delivery of the E-Rate discount checks.

[22] "Property covered by these provisions is 'excluded' from the estate, rather than being 'exempted' under other portions of the Code." Pet., App. at 8a.

debtor holds, as of the commencement of the case, only legal title and not an equitable interest." Pet., App. at 9a.[23] Under 11 U.S.C. § 541(d), a debtor's title becomes property of the estate but "only to the extent of the debtor's legal title to such property" and "not to the extent of any equitable interest in such property that the debtor does not hold." Pet., App. at 63a.

Petitioner argues that Lan Tamers' "interest in the USAC payment" makes the E-Rate discounts property of the estate and erroneously alleges that "Springfield has never contested this issue." Pet. 13. The record shows that Lan Tamers has no interest at all in the E-Rate discounts. Under the federal E-Rate program, Lan Tamers:

> was obligated to remit the funds received from USAC to the City as soon as possible after receipt, and certainly no later than 10 calendar days thereafter. Further, under no circumstances was the Debtor permitted to employ those funds for its own use.

Pet., App. at 30a. Lan Tamers has an enforceable legal obligation to immediately deliver the E-Rate discounts to Springfield. Pet., App. at 27a-29a; *see also* Pet., App. at 5a; 20a n.1. A duty to turn over funds to the beneficial owner is not an interest in the funds. It is not title to the funds.

From the outset of this litigation, Springfield has maintained that Lan Tamers has no interest in the E-Rate discounts. Shortly after Lan Tamer filed for bankruptcy,

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[23] Another potentially applicable exclusion "§ 541(c)(2), removes inalienable interests in trusts" from property of the estate. Pet., App. at 9a.

Springfield appeared at a hearing[24] and "forcefully asserted its claim to the Reimbursements, arguing that they were property of the City and not of the estate." Pet., App. at 31a. Springfield's complaint asked the Bankruptcy Court to "rule that the Reimbursements are not property of the estate, but property of the City, free and clear of any claim." Pet., App. at 32a. From the beginning Springfield maintained that the E-Rate discounts "are not and never were, property of the Debtor. The Debtor was paid in full by the City." Pet., App. at 32a. Springfield's position is that Lan Tamers "was never entitled to retain those funds or use them for its own purposes" but "was under a duty to remit promptly to the City." Pet., App. at 32a.

Springfield did not voluntarily pre-pay Lan Tamers. Springfield hired Lan Tamers under a written contract. Lan Tamers performed the work. Springfield fully paid Lan Tamers for performing the contract. Pet., App. at 29a. Springfield applied to USAC for the federal E-Rate discounts and USAC, eventually, issued funding commitments to Springfield.[25] Pet., App. at 29a-30a. USAC is withholding delivery of the E-Rate discount checks pending the final outcome of this action.

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[24] At an earlier hearing, Lan Tamers admitted "that the monies due were no property of the Debtor. The Debtor characterized itself as a 'pass-through' of the funds from USAC to the City." Pet., App. at 31a.

[25] As part of the application process Lan Tamers was made aware of the requirement that it "turn over the BEAR reimbursement amount (to the applicant) within 10 days of receipt of the check." Pet., App. at 28a-29a. According to the USAC guidelines Lan Tamers' role in the E-Rate discounts was to function "as a vehicle to deliver the reimbursement back to the applicant." Pet., App. at 29a. Any failure by Lan Tamers to deliver the E-Rate discounts to Springfield "in a timely fashion" could "result in" Lan Tamers "facing enforcement action." Pet., App. at 29a.

Petitioner also misses the mark by arguing that "the Bankruptcy Code must defer to state law for its definition of property rights." Pet. 13. Congress wrote the Bankruptcy Code and the Telecom Act. Congress has no obligation to defer to state law when it writes federal law. Under the Supremacy Clause, state law must defer to federal law. A recognized property interest under state law (which Petitioner does not have) is not property of a bankruptcy estate where, as in this case, the Bankruptcy Code expressly excludes it. The E-Rate program is a federal program, not a state program. The Telecom Act and its implementing regulations which govern the E-Rate program are federal not state laws.[26] Petitioner's flawed[27]

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[26] Under the Supremacy Clause, the Telecom Act invalidates any inconsistent state law regulating the E-Rate program, if there was one – which, of course, there isn't.

[27] The Petitioner's constructive trust argument (Pet. 6-7) omits the fact that a constructive trust is an equitable remedy designed to prevent unjust enrichment. Lan Tamers has a legal obligation to pay over the funds to the City within 10 days of receipt. That legal obligation is a fiduciary duty arising from the BEAR application process. Under Massachusetts law, "[t]here are many familiar and well recognized forms of fiduciary relationships.... The relationship is not confined, however, to these and similar situations for the circumstances which may create a fiduciary relationship are so varied that it would be unwise to attempt the formulation of any comprehensive definition that could be uniformly applied in every case. There is jurisdiction in equity to prevent, by means of the remedial device of a constructive trust, unjust enrichment arising out of a breach of a fiduciary relation. The existence of the relationship in any particular case is to be determined by the facts established. *Warsofsky v. Sherman*, 326 Mass. 290, 292 (1950). Lan Tamers' fiduciary duty to turn the E-Rate discount over to the City arises from Lan Tamers' written acknowledgment of its responsibility to remit the amount "in no event later than 10 calendar days after receipt of the reimbursement payment from the fund administrator." This written acknowledgment legally obligated Lan Tamers to promptly remit the E-Rate discount to the City and established

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state law constructive trust contentions do not provide any justifiable ground for review by this Court. The state law of constructive trusts was not the basis of the First Circuit's decision that the E-Rate discounts were excluded from property of bankrupt estate. "The plain text of § 541(d) excludes property from the estate where the bankrupt entity is only a delivery vehicle and lacks any equitable interest in the property it delivers. Identical language found in both the House and Senate reports that accompanied passage of the Bankruptcy Code strongly reinforces this plain reading." Pet., App. at 9a-10a (citation omitted).

Lan Tamers' fiduciary duty with respect to the discount. Imposition of a constructive trust in favor of Springfield upon the E-Rate discount is just. A court may impose a constructive trust upon disputed property to prevent unjust enrichment. Springfield supplied the full purchase price for the work on the Central High School and Network Maintenance projects. Lan Tamers has an enforceable legal duty to promptly remit the E-Rate discount to the City. Once Lan Tamers completed the contracts for the projects and was paid by Springfield, all that remained of Lan Tamers' obligations were those duties imposed by the law controlling disbursement of the federal funds. Neither Lan Tamers nor the Petitioner has any right to be unjustly enriched at the expense of Springfield and the federal taxpayers. The Petitioner has no beneficial property interest in the E-Rate discount because Lan Tamers does not have any such interest. "Where the debtor's 'conduct gives rise to the imposition of a constructive trust, so that the debtor holds only bare legal title to the property, subject to a duty to reconvey it to the rightful owner, the estate will generally hold the property subject to the same restrictions'." *In re Howard's Appliance Corp.*, 874 F.2d 88, 93 (2nd Cir. 1989) (citations omitted). Under the circumstances of this case, the Bankruptcy Court correctly ruled that Lan Tamers holds the E-Rate discount under a constructive trust for Springfield and they are not property of the bankruptcy estate. Pet., App. at 41a-48a; *see also* Pet., App. at 39a-40a (discussing resulting trusts).

3. The First Circuit did not create new doctrine.

The federally authorized E-Rate discounts are not property of the bankruptcy estate but are excluded therefrom by § 541(d) of the Bankruptcy Code. Springfield is not a creditor of Lan Tamers with respect to the unpaid E-Rate discounts, so the general bankruptcy policy of ratable distribution among creditors has no application in this case. Springfield fully paid Lan Tamers everything due it in connection with the contracts. The First Circuit did not err by following the "fundamental principle of bankruptcy law 'that the estate can only succeed to the same property interest that the debtor possesses, and cannot achieve a greater interest.'" Pet., App. at 14a (citation omitted). Lan Tamers has no property interest in the unpaid E-Rate discounts. Neither Lan Tamers nor the Petitioner is the grantee of the E-Rate discounts. Neither has a viable claim to them. The Bankruptcy Code does not authorize diversion of the E-Rate discounts away from the public schools into Petitioner's pocket. Petitioner's unilateral desire for the discounts is not a legitimate claim of entitlement under either federal or state law.

Petitioner incorrectly asserts that the First Circuit created the doctrine of pass-through and then, Petitioner compounds its error by arguing that the doctrine "is at odds" with the Bankruptcy Code. Pet. 7-8; 14-17. The 'pass through' requirement is a grant condition imposed by USAC on the E-Rate program in order to ensure that the federal purposes of the Telecom Act are achieved. "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *U.S. v. American Library Ass'n, Inc.*, 123 S.Ct. 2297, 2303 (2003) (citation omitted). "In the words of

USAC's guidance to service providers, LAN Tamers 'function[ed] merely as a vehicle to deliver the reimbursement back to the applicant.'" Pet., App. at 12a; *see also* Pet., App. at 27a-29a. Under the E-Rate program Lan Tamers was required to deliver the E-Rate discounts to the City "as soon as possible after receipt, and certainly no later than 10 calendar days thereafter." Pet., App. at 30a. Lan Tamers signed a BEAR form in connection with the E-Rate discounts. The purpose of Lan Tamers' signature was "to ensure" that Lan Tamers was "aware of the requirement" to "turn over the BEAR reimbursement amount (to the applicant) within 10 days of receipt of the check. *The Service provider functions merely as a vehicle to deliver the reimbursement back to the applicant.*"[28] Pet., App. at 28a-29a. In light of these undisputed record facts and the fact that there are no circumstances under which Lan Tamers is "permitted to employ those funds for its own use" (Pet., App. at 30a), it is hardly surprising that the First Circuit determined:

> that the regulatory structure of the E-Rate program reduced LAN Tamers to the status of a mere delivery vehicle. LAN Tamers signed an acknowledgment stating as much and foregoing any beneficial interest in the funds. USAC's guidance reiterates the point forcefully.

Pet., App. at 13a.

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[28] The italics for emphasis are contained in the original decision of the Bankruptcy Court. The Bankruptcy Court's emphasis of this crucial sentence, however, was omitted from the Petition Appendix. Pet., App. at 29a.

Congress, not the First Circuit, drafted the plain language of § 541(d) of the Bankruptcy Code. That provision expressly excludes property from the bankruptcy estate when the debtor is merely a delivery vehicle lacking equitable interest to the property it delivers. Pet., App. at 9a-10a. The clear intent to exclude these negligible interests from property of the estate is evidenced by the House and Senate reports accompanying passage of the Bankruptcy Code:

> Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor, but will be held in trust for another. . . . In this congressional hypothetical, property is excluded from the estate where the debtor merely receives property in order to deliver it to its intended recipient without any control or ownership over it.

Pet., App. at 10a (citations omitted).

Petitioner's contention (Pet. 15) with respect to *Yonkers Board of Educ. v. Richmond Children's Ctr.*, 58 B.R. 980 (S.D.N.Y. 1986), ignores the significance of the First Circuit's introductory signal "*cf*" as well as the First Circuit's parenthetical explanation for citing the case as one in which "funds from state education department paid to debtor but designated as 'pass-through' payment for school district are not property of the estate." Pet., App. at 12a.[29] Petitioner's assertions with respect to the First Circuit's citation to *In re Joliet-Will County Cmty Action*

[29] The Bankruptcy Court's decision contains a more extensive discussion of *Yonkers*. Pet., App. at 43a-44a.

Agency, 847 F.2d 430 (7th Cir. 1988) (Pet. 15-16) are also unfounded. Pet., App. at 11a.[30]

Petitioner's argument that the First Circuit cited these cases as judicial precedent for creating property interests is fallacious. Pet. 15-17. The First Circuit carefully identified and thoughtfully applied to the undisputed facts in this case the common modes of legal analysis found in those cases. The First Circuit looked at Lan Tamers' role in the E-Rate discount program and properly determined "that the regulatory structure of the E-Rate program reduced LAN Tamers to the status of a mere delivery vehicle." Pet., App. at 12a-13a. Then the First Circuit looked "to the degree and intensity of regulatory control over the property in question" and correctly decided that under "the BEAR payment method, LAN Tamers has absolutely no freedom to do anything with the reimbursements except forward them to Springfield within ten days." Pet., App. at 13a. Next, the First Circuit focused "on the extent to which recognizing a greater ownership interest – and thereby diverting the property in question to the creditors – would thwart the overall purpose of the regulatory scheme." Upon applying this factor to the undisputed facts in this case, the First Circuit properly found that "it is clear that Congress intended money from the USF to pay only for certain very specific activities" and that "LAN Tamers has already been paid for the eligible services it provided; allowing USF funds to pay its other debts would violate this congressional mandate." Pet.,

[30] For another § 541(d) analogy, the First Circuit cited *In re Columbia Gas Systems, Inc.*, 997 F.2d 1039 (3d Cir. 1993). Pet., App. at 11a-12a.

App. at 14a. In concluding its analysis and determining that under the particular facts of this case application of § 541(d) was justified, the First Circuit observed:

> this conclusion also prevents the creditors from receiving a windfall of double payment for the work LAN Tamers completed in Springfield's schools. If LAN Tamers had not filed for bankruptcy, it could hardly sue USAC in its own right to be paid again, having received full payment for its services from Springfield long before. Once USAC issued the check to LAN Tamers, the company could not have diverted the funds to its creditors or to other purposes without "facing enforcement action." At most, LAN Tamers arguably would hold bare legal title to the reimbursements for a short time. It is a fundamental principle of bankruptcy law "that the estate can only succeed to the same property interest that the debtor possesses, and cannot achieve a greater interest." 5 L.P. King et al., *Collier on Bankruptcy* ¶ 541.01, at p. 541-8 (15th ed.2003) (discussing § 541(d)). A conclusion that the reimbursements should be distributed to the creditors would flout this basic premise. It would provide a windfall to the creditors at the expense of Springfield's public schools and its students, contrary to the dictates of the statutory and regulatory text underlying the E-Rate program.

Pet., App. at 14a-15a (footnote omitted).

D. This is an inappropriate case for resolving bankruptcy aspects of constructive trusts

The Petitioner asks the Court to establish a "bright line test to determine when a constructive trust properly exempts property from a bankrupt estate" to resolve what

Petitioner views as "divergent approaches" to the treatment of constructive trusts in the Circuits. Pet. 17-24. If there are divergent approaches in the Circuits with respect to the treatment of constructive trusts under § 541(d) of the Bankruptcy Code, then the Court will be able to select an appropriate case to resolve that issue. This, however, is not such a case. In this case, the Court should avoid becoming enmeshed in the difficult issues posed by the treatment of constructive trusts under the Bankruptcy Code because the record with respect to those issues is undeveloped.

The First Circuit did not base its decision on the application of § 541(d) to the constructive trust doctrine but thought it "better to avoid the language of trusts" and rested its holding "on the fact that LAN Tamers, as a mere delivery vehicle, lacked an equitable interest in the reimbursements under the federal program." Pet., App. at 18a (citations and footnote omitted). The First Circuit's reasons for avoiding the constructive trust issue are sound. "There is no basis for a per se rule limiting § 541(d) to state law trusts under all circumstances." Pet., App. at 15a. The Court has already "unanimously rejected such a 'state law only' interpretation in *Patterson v. Shumate*, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992)." Pet., App. at 15a. Whenever Congress intends "for bankruptcy questions to be answered only by reference to state law, it so specified. *Patterson*, 504 U.S. at 758, 112 S.Ct. 2242 (citing examples)." Pet., App. at 16a. It was logical for the First Circuit to reason that in:

> In the absence of any language specifically incorporating state law in the *exclusions*, the "natural reading" of § 541(d), like the *Patterson* Court's reading of § 541(c)(2), cuts against the trustee's

> proposed construction that it incorporates and is restricted by state law in all situations.

Pet., App. at 16a. Where, as in this case, "there are significant federal interests involved, the default rule of applying state standards to bankruptcy determinations may yield." Pet., App. at 17a. In this case the:

> statutory and regulatory framework for the E-Rate program, established under the Telecom Act, provides a federal definition of the property interests involved. . . . That definition takes account of the federal government's aspiration, expressed in the Telecom Act and promoted by the activities of the FCC and USAC, that "[e]lementary and secondary schools and classrooms . . . should have access to advanced telecommunications services." 47 U.S.C. § 254(b)(6).

Pet., App. at 17a. Moreover, just "as the language of § 541(d) does not invariably incorporate state law, it is not always limited to trusts either." Pet., App. at 17a.

The First Circuit did not decide this case on the basis of constructive trusts under the Bankruptcy Code. This is not an appropriate case in which to address that issue. The substantial federal concerns arising from the Telecom Act differentiate this case from other cases discussing constructive trust issues under the Bankruptcy Code. The First Circuit's ruling is rooted in the substantial federal concerns which arise under the Telecom Act making any attempt to formulate a general bright line rule for constructive trusts under the Bankruptcy Code of limited utility. The First Circuit's decision which clearly avoided the constructive trust issue is obviously correct and involves no basis for review by this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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